

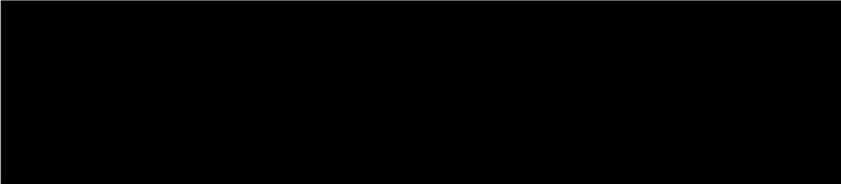
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U.S. Citizenship
and Immigration
Services

MI



FILE: [REDACTED]
[EAC 03 076 54128]

OFFICE: Vermont Service Center

DATE: JAN 14 2008

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Temporary Protected Status under Section 244 of the Immigration and Nationality Act, 8 U.S.C. § 1254

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Vermont Service Center (VSC). It is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The applicant is a citizen of El Salvador who is seeking Temporary Protected Status (TPS) under section 244 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1254.

The director denied the application on the ground that the applicant failed to provide the final court disposition(s) of his criminal arrest(s).

On appeal counsel submits a copy of the court's case history of the applicant's arrest.

Section 244(c) of the Act, and the related regulations in 8 C.F.R. § 244.2, provide that an applicant who is a national of a foreign state is eligible for TPS only if such alien establishes that he or she:

- (a) Is a national of a state designated under section 244(b) of the Act;
- (b) Has been continuously physically present in the United States since the effective date of the most recent designation of that foreign state;
- (c) Has continuously resided in the United States since such date as the Attorney General may designate;
- (d) Is admissible as an immigrant except as provided under section 244.3;
- (e) Is not ineligible under 8 C.F.R. § 244.4; and
- (f)
 - (1) Registers for Temporary Protected Status during the initial registration period announced by public notice in the FEDERAL REGISTER, or
 - (2) During any subsequent extension of such designation if at the time of the initial registration period:
 - (i) The applicant is a nonimmigrant or has been granted voluntary departure status or any relief from removal;
 - (ii) The applicant has an application for change of status, adjustment of status, asylum, voluntary departure, or any relief from removal which is pending or subject to further review or appeal;
 - (iii) The applicant is a parolee or has a pending request for reparole; or

- (iv) The applicant is a spouse or child of an alien currently eligible to be a TPS registrant.
- (g) Has filed an application for late registration with the appropriate Service director within a 60-day period immediately following the expiration or termination of conditions described in paragraph (f)(2) of this section.

The phrase continuously physically present, as defined in 8 C.F.R. § 244.1, means actual physical presence in the United States for the entire period specified in the regulations. An alien shall not be considered to have failed to maintain continuous physical presence in the United States by virtue of brief, casual, and innocent absences as defined within this section.

The phrase continuously resided, as defined in 8 C.F.R. § 244.1, means residing in the United States for the entire period specified in the regulations. An alien shall not be considered to have failed to maintain continuous residence in the United States by reason of a brief, casual, and innocent absence as defined within this section or due merely to a brief temporary trip abroad required by emergency or extenuating circumstances outside the control of the alien.

El Salvadoran nationals applying for TPS must demonstrate continuous residence in the United States since February 13, 2001, and continuous physical presence in the United States since March 9, 2001. The initial registration period for El Salvadorans was from March 9, 2001 through September 9, 2002.

To qualify for late registration, the applicant must provide evidence that during the initial registration period he met at least one of the qualifying conditions described in 8 C.F.R. § 244.2(f)(2) above.

An alien shall not be eligible for temporary protected status under this section if the Secretary of the Department of Homeland Security finds that the alien has been convicted of any felony or two or more misdemeanors committed in the United States. See Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a).

8 C.F.R. § 244.1 defines “felony” and “misdemeanor:”

Felony means a crime committed in the United States, punishable by imprisonment for a term of more than one year, regardless of the term such alien actually served, if any, except: When the offense is defined by the State as a misdemeanor and the sentence actually imposed is one year or less regardless of the term such alien actually served. Under this exception for purposes of section 244 of the Act, the crime shall be treated as a misdemeanor.

Misdemeanor means a crime committed in the United States, either

- (1) Punishable by imprisonment for a term of one year or less, regardless of the term such alien actually served, if any, or
- (2) A crime treated as a misdemeanor under the term "felony" of this section.

For purposes of this definition, any crime punishable by imprisonment for a maximum term of five days or less shall not be considered a misdemeanor. 8 C.F.R. § 244.1.

The burden of proof is upon the applicant to establish that he or she meets the above requirements. Applicants shall submit all documentation as required in the instructions or requested by Citizenship and Immigration Services (CIS). *See* 8 C.F.R. § 244.9(a). The sufficiency of all evidence will be judged according to its relevancy, consistency, credibility, and probative value. To meet his or her burden of proof the applicant must provide supporting documentary evidence of eligibility apart from his or her own statements. *See* 8 C.F.R. § 244.9(b).

The record shows that the applicant – who claims to have entered the United States in February 1993 and was granted conditional permanent resident status on July 7, 1998 – filed his initial Application for Temporary Protected Status (Form I-821) on October 31, 2002 – nearly two months after the close of the initial registration period for El Salvadoran nationals on September 9, 2002. On June 4, 2003, the VSC requested the applicant to submit evidence that he met one of the criteria for late registration set forth at 8 C.F.R. § 244.2(f)(2), as well as the final court disposition(s) of every criminal charge against him in the United States and, if he was convicted of any charge, whether the crime was classified as a felony or a misdemeanor. The applicant responded on July 8, 2003, by submitting some additional documentation, including a photocopy of a Notice of Action issued to his attorney by the VSC on June 16, 2000, confirming that it had received the applicant's Form I-751, Application to remove conditional residential status.

On October 7, 2003, the VSC Director issued a decision denying the application for TPS. The director found that the applicant had established his eligibility for late registration,¹ but denied the application on the ground that no evidence had been submitted of the final court disposition(s) of the applicant's arrest(s).

On appeal, counsel submits a copy of the "Case History" from the Circuit Court for Frederick County (Maryland) confirming that the applicant was arrested in Maryland on July 1, 1998, charged with multiple offenses, and pleaded guilty on May 15, 2001, to a single count of assault in the second degree under Article 27, Section 12A of the Maryland Criminal Code. That code section [now Maryland Criminal Code § 3-203(b)] specifies that second degree assault is a "misdemeanor" punishable by "a fine of not more than \$2,500 or imprisonment for not more than 10 years or both." The applicant was sentenced to 364 days in prison, of which approximately half (six months and five days) were suspended, and 18 months probation. On December 9, 2002, at a post-conviction hearing, the State of Maryland amended the complaint to Harassment, the applicant pleaded guilty thereto and was sentenced to time served, and the prior conviction was vacated. The crime of harassment under Maryland law is a misdemeanor punishable by not more than 90 days imprisonment or a fine of up to \$500, or both [Maryland Criminal Code § 3-803(c)].

¹ Although the director did not further explain this finding, it is clear that it was based on the pending Form I-751 application in conjunction with the conditional approval on July 7, 1998 of the applicant's Form I-485, Application to Register Permanent Residence or Adjust Status, following his marriage to a U.S. citizen on May 7, 1997.

For immigration purposes, the applicant's original conviction is determinative as to whether he has been convicted of a felony or a misdemeanor. See section 101(a)(48(A) of the Act and *Matter of Roldan*, 22 I&N 512, 523 (BIA 1999). Although the crime of second degree assault is punishable by up to 10 years in prison, it is defined as a misdemeanor under Maryland law and the applicant was sentenced to only 364 days in prison, of which more than half were suspended. Thus, the applicant's conviction for second degree assault fits the misdemeanor exception in 8 C.F.R. § 244.1 of an offense "defined by the State as a misdemeanor" for which "the sentence actually imposed [and served] is one year or less." Since the applicant has been convicted of a single misdemeanor, he is not ineligible for TPS under section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). Accordingly, the applicant has overcome that ground for denial.

A review of the entire record, however, clearly shows that the applicant does not meet the requirements of continuous physical presence in the United States since March 9, 2001, and continuous residence in the United States since February 13, 2001, as required for El Salvadoran nationals under 8 C.F.R. § 244.2(b) and (c). Pursuant to a removal order issued by an Immigration Judge on May 6, 2002, the applicant was deported from the United States on March 20, 2004. The applicant then re-entered the United States illegally on August 5, 2004 and was apprehended on August 6, 2004, whereupon the prior removal order was reinstated and the applicant was deported again on March 28, 2005. Thus, the applicant was absent from the United States for four and one-half months in 2004 and, as far as the record shows, has been continuously absent since March 2005, pursuant to a removal order under U.S. immigration law.

The phrase brief, casual, and innocent absence, as defined in 8 C.F.R. § 244.1, means a departure from the United States that satisfies the following criteria:

- (1) Each such absence was of short duration and reasonably calculated to accomplish the purpose(s) for the absence;
- (2) The absence was not the result of an order of deportation, an order of voluntary departure, or an administrative grant of voluntary departure without the institution of deportation proceedings; and
- (3) The purposes for the absence from the United States or actions while outside of the United States were not contrary to law.

The applicant's absences from the United States were not "brief, casual, and innocent" within the meaning of 8 C.F.R. § 244.1 because they were extended in duration and the result of an order of deportation. Therefore, the applicant has not been continuously physically present in the United States since March 9, 2001, and has not been continuously resident in the United States since February 13, 2001, as required under 8 C.F.R. § 244.2(b) and (c). Accordingly, the applicant is ineligible for TPS.

The application will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. An alien applying for TPS has the burden of proving that he or she meets the requirements enumerated above and is otherwise eligible under the provisions of section 244 of the Act. The applicant has failed to meet that burden.

ORDER: The appeal is dismissed.